

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

Richard Marshall

v.

Civil Action No. 97-420-T

United States of America

Memorandum and Order

Richard Marshall has moved, pursuant to 28 U.S.C. § 2255, to correct his sentence for what he contends was the Court's erroneous failure to take into account an amendment to § 2D1.1(b) of the United States Sentencing Guidelines (Guidelines) that became effective after he was sentenced. Because this Court finds that the amendment has no application to Marshall and that, in any event, it would not have affected the sentence, his motion is DENIED.

Background

On May 1, 1995, Marshall was convicted, after trial, of possession of Heroin with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). Pursuant to Guideline § 2D1.1, the presentence report (PSR) calculated Marshall's net offense level as level 26 and the applicable guideline range as 63-78 months. Marshall did not object to those calculations and received a sentence of 72 months.

At the time Marshall was sentenced, a proposed amendment to § 2D1.1 was pending that provided for a two-level reduction in the base offense level in the case of defendants who qualified for the "safety valve provision" contained in 18 U.S.C. § 3553 and had an offense level of 26 or greater. U.S.S.G. Amendment 515, Appendix

C at 417 (Nov. 1995). That amendment eventually took effect on November 1, 1995, six months after Marshall had been sentenced.

Discussion

Marshall claims that the amendment to § 2D1.1 should have been applied to his case. He relies on a very selective and erroneous reading of § 1B1.11. That section requires a sentencing court to utilize the guidelines in effect on the date of sentencing unless doing so would violate the ex post facto clause of the Constitution. The portion upon which Marshall focuses states:

However, if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes.

U.S.S.G. § 1B1.11.

Marshall's reliance on the quoted language is misplaced for several reasons. First, in sentencing Marshall, the Court did not apply "an earlier edition of the Guidelines Manual." It applied the manual in effect at the time of sentencing. Moreover, when an earlier edition is applied, the only subsequent amendments that need to be considered are those amendments in effect at the time of sentencing. Section 1B1.11 does not require retroactive application of Guideline amendments adopted after a defendant has been sentenced.

Even if post-sentencing amendments could be considered, the First Circuit has held that the amendment cited by Marshall is "substantive" and should not be applied retroactively. United States v. Sanchez, 81 F.3d 9, 12 (1st Cir. 1996).

Finally, even if the amendment to § 2D1.1 applied retroactively, it would not affect Marshall's sentence because Marshall does not qualify for the "safety valve provisions" of 18 U.S.C. § 3553. Section 3553(f), which is mirrored in U.S.S.G. § 5C1.2, requires that, in order to qualify, a defendant, among other things, must have "truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan" U.S.S.G. § 5C1.2. In this case, the record is devoid of any indication that Marshall has satisfied that requirement. Marshall was convicted after trial and did not even provide an acceptance of responsibility statement prior to sentencing. Thus, the PSR states "[t]he defendant was afforded the opportunity to submit a statement pertaining to his involvement in the offense now before the Court. However, as of the dictation of this report, a statement was not submitted to the Probation Department." PSR ¶ 16.

Conclusion

For all of the foregoing reasons, Marshall's motion to correct sentence is DENIED.

IT IS SO ORDERED,

Ernest C. Torres
United States District Judge

Date: August , 1997